

**IN THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT, IN AND FOR
MIAMI-DADE COUNTY, FLORIDA**

DR. JAMES ERIC MCDONOUGH,
Plaintiff,

CASE NO: 19-06869 CA (15)

vs.

CITY OF HOMESTEAD,
a Florida municipal corporation,
Defendant,

**PLAINTIFF'S VERIFIED MOTION TO STRIKE DEFENDANT'S MOTION TO STAY
DISCOVERY AS A SHAM PLEADING, RESULTING IN THE PERPETRATION OF A
FRAUD UPON THE CIRCUIT COURT AND MOTION FOR AN ORDER IMPOSING
SANCTIONS AGAINST DEFENDANT AND/OR DEFENDANT'S COUNSEL**

Pro se Plaintiff, Dr. James Eric McDonough, hereby moves this Court pursuant to *Fla. R. Civ. P.* 1.150 to strike Defendant City of Homestead's Motion to Stay Discovery in its entirety, based upon the allegations therein as being a sham pleading resulting in the perpetration of a fraud upon the Circuit Court. Plaintiff seeks the imposition of monetary and non-monetary sanctions against Defendant and Defendant's counsel and states as good cause the following:

I. FACTS.

1. On March 8, 2019, Plaintiff filed a Petition for Writ of Mandamus to enforce the Florida Public Records Act and Article I, Section 24 of the Florida Constitution against Defendant, due to Defendant's non-compliance with its statutory and non-discretionary duties.

2. On March 11, 2019, Defendant provided Plaintiff with the first set of responsive documents. Thereafter, Plaintiff amended his petition to reflect that Defendant had provided responsive records. However, the documents provided demonstrate that they were retrieved on February 20, 2019 and were then withheld from Plaintiff for three weeks before being produced.

3. On March 13, 2019, Plaintiff contacted opposing counsel, Matthew Mandel, to confer in good faith on setting a hearing in the instant action. Mr. Mandel replied claiming that

the Defendant had already provided the responsive documents at no cost, the instant action was moot, and there was no basis for a hearing. See **Exhibits J and K** attached hereto.

4. On March 13, 2019, the Honorable Judge Rodriguez issued an Alternative Writ of Mandamus based upon the amended Petition.

5. On March 15, 2019, after Plaintiff complained that not all responsive documents had been provided, Defendant provided a second set of responsive documents. See **Exhibit F** attached hereto.

6. On March 21, 2019, after further complaint that not all responsive records had been provided, Defendant produced a third set of responsive documents. See **Exhibit H** attached hereto.

7. On March 26, 2019, after still further complaint that not all responsive records had been provided, Defendant produced a fourth set of responsive documents. Defendant also identified a fifth set of responsive documents, which Plaintiff explicitly identified as responsive and not produced, but Defendant falsely claims they are not responsive to the request and to date has failed to provide them. See **Exhibit P** attached hereto. Further, Plaintiff has a good faith belief that discovery will lead to at least a sixth set of responsive documents.

8. On March 27, 2019, Defendant filed its Motion to Stay Discovery wherein it has been intentionally and falsely claimed for a second time now that all responsive records have been produced. See Defendants Motion to Stay Discovery, ¶ 17.

II. LEGAL ARGUMENTS.

9. To determine whether particular conduct was sufficient to justify fraud on the court, the test set forth in *Aoude v. Mobil Oil Corp.*, 892 F.2d 1115, 1118 (1st Cir. 1989) states:

A “fraud on the court” occurs where it can be demonstrated, clearly and convincingly, that a party has sentiently set in motion some unconscionable scheme calculated to interfere with the judicial system’s ability impartially to adjudicate a matter by improperly influencing the trier or unfairly hampering the presentation of the opposing party’s claim or defense.

10. Defendant alleges that Plaintiff unilaterally set the depositions of the non-party witnesses. However, Defendant fails to disclose that Plaintiff emailed Defendant on March 14, 2019 to confer in good faith to schedule the depositions requesting dates of availability. In Plaintiff's attempt to confer it was clearly stated that if no response was received by March 18, 2019 it would be understood by all parties that there was no intention to cooperate and Plaintiff would move to set the depositions at the earliest time convenient to him and subpoena the deponents. See **Exhibit R** attached hereto. As such Plaintiff's unilateral setting of the depositions was forced only by Defendant's undisclosed wholesale failure to confer in good faith herein.

11. Defendant alleges that Matthew Oakey is not authorized to video the depositions. However, Mr. Oakey a Notary Public is certified to place persons under oath in the State of Florida and is therefore authorized to video the depositions. Further, Plaintiff has arranged for a certified court reporter to be present to stenographically record the depositions.

12. Defendant alleges that Plaintiff is *pro se* and therefore not entitled to videotape depositions, as he is not authorized under the rule to take custody of the video. However, Plaintiff representing himself *pro se* is acting as his own attorney. Furthermore, Plaintiff acting *pro se* took video depositions in public records Case No. 17-017515, took custody of the recording and immediately provided Defendant with a copy free of charge, and will do the same herein. As such Plaintiff can and will meet all requirements of *Fla. R. Civ. P.* 1.380(4).

13. Florida has broad discovery and liberal public records laws. See *Fla. R. Civ. P.* 1.280(b)(1) and *City of Riviera Beach v. Barfield*, 642 So. 2d 1135, 1136 (Fla. 4th DCA 1994). Although Defendant attempts to block and/or limit Plaintiff's discovery, "discovery in a context such as the one at hand may well be appropriate in the circumstance where a good faith belief exists that the public agency may be playing 'fast and loose' with the requesting party or the court, once its statutorily delegated authority is activated." *Lorei v. Smith*, 464 So. 2d 1330, 1333 (Fla.

2d DCA 1985). Here Defendant has at four different times now produced records responsive to Plaintiffs records request, after suit was filed. Yet, Defendant has failed to produce all responsive documents though twice now it has intentionally and falsely asserted that all responsive documents have been produced. There could be few clearer examples of a public agency playing “fast and loose” once its statutorily delegated authority is activated. As such discovery is appropriate.

14. Defendant’s Motion for Stay under *Fla. R. Civ. P.* 1.280(c) is legally insufficient. A motion under 1.280(c) must show good cause. *Ankhnoukh v. Benvenuto*, 219 So.3d 96 (Fla. 2d DCA 2017). The showing of good cause must be affirmative. See *Travelers Indem. Co. v. Hill*, 388 So.2d 648 (Fla. 5th DCA 1980). The mere fact that compliance with a discovery order will be costly is not in and of itself, a ground for valid objection. *Ford Motor Co. v. Edwards*, 363 So.2d 867 (Fla. 1st DCA 1978). However, the motion is not supported by oath, affirmation, or clear and convincing evidence. As such, Defendant has failed to make a showing of good cause, and staying discovery directed at finding additional unproduced records would circumvent the reason for having an immediate hearing on the production of records. Further, staying Plaintiff’s discovery until after the immediate hearing would unfairly hamper Plaintiff’s presentation of his claim.

15. Additionally, Defendant makes general allegations of a need for protection from annoyance, embarrassment, oppression, or undue burden or expense. However, Plaintiff has scheduled the depositions back to back on the hour and expects them to take less than an hour each. Also, Defendant has failed to allege any specific annoyance, embarrassment, oppression, or undue burden or expense, nor has Defendants supported such allegations by affirmation. Further, a party seeking protection under 1.280(c), at least when claiming undue burden and harassment, cannot simply rely upon unfounded allegations contained within their motion and must present support for their legal positions--unsworn representations of counsel have no evidentiary value. See, e.g. *Topp Telecom, Inc. v. Atkins*, 763 So. 2d 1197, 1199 (Fla. 4th DCA 2000)(“There

is obviously no error in overruling this kind of objection when it is not supported by record evidence, such as an affidavit detailing the basis for claiming that the onus of supplying the information or documents is inordinate.”)

16. Plaintiff plans to focus the depositions on the relevant issues of unjustified delay and failure to provide responsive and non-exempt documents, which the record shows are the key issues of the instant action, and of which Defendant is in violation. See *Fla. R. Civ. P.* 1.280(b)(1), (b)(3). See also *City of Gainesville v. Scotty's Inc.*, 489 So.2d 1196 (Fla. 1st DCA 1986).

17. As an aside, when Plaintiff deposed the non-party witness, Zachery Good, in Case No. 17-017515, Plaintiff concluded the deposition in less than fifteen (15) minutes and did not probe matters uncovered therein (i.e. unlawful censorship) which were not relevant to the issues of the case. As such Defendant has no good faith basis to allege that Plaintiff would probe matters not relevant and admissible, or at least reasonably calculated to lead to discovery of admissible material, or that Plaintiff intends to use the discovery process as a “fishing expedition.”

18. Defendant alleges that Plaintiff only seeks Mandamus relief to compel production of records responsive to his request for public records. However, Defendant has produced responsive records four times now. Defendant has acknowledged the existence of a fifth set of non-exempt records which it falsely claims are not responsive and that it has not provided. Whereas, Plaintiff has a good faith belief that at least a sixth set of responsive and not produced records exists, and discovery through depositions is the best method to determine if this is true. Furthermore, Plaintiff also explicitly requested “other such relief as is just and proper under the circumstances.” Based upon Defendants willful delay in the production of records and the repeated failure to provide all responsive records, Plaintiff should be eligible for injunctions prohibiting Defendant from committing such violations in the future. Whereas, the lawfulness of the delay and refusal to produce records, and Defendant’s intent to violate the law should also be determined.

19. Defendant argues that discovery should be stayed pending the outcome of the initial hearing, as it is possible that all issues may be resolved at that time. However, without discovery into whether there are additional responsive records which have not been produced, the initial hearing CANNOT resolve all issues.

20. Defendant cites a litany of inapposite case law holding that discovery can be stayed until resolutions of motions to dismiss or until there is a valid operable complaint. However, there are no pending motions to dismiss. Further, the issuance of the Alternative Writ of Mandamus is itself *prima facie* evidence of the existence of a valid operable complaint, and there are no unheard dispositive motions to resolve facial challenges to Plaintiff's complaint.

21. Defendant will not be prejudiced if discovery is permitted, however, Plaintiff will be prejudiced if discovery is stayed and his substantial right to an immediate hearing is delayed and/or made ineffectual by lack of discovery on the pertinent issues. Whereas, failure to uncover the presence of additional responsive records will impact this Court's ability to conduct the immediate hearing. Further, staying discovery will not only prejudice the Plaintiff, but will also increase the burden on this Court to come to a final resolution on the merits of the instant action.

22. Defendant's motion, not supported by oath or affirmation, is not made in good faith, is based upon knowingly false allegations, attempts to improperly influence the trier of fact and hamper Plaintiff's presentation of his claim, and creates undue burden and delay in the resolution of the matters before this Court.

WHEREFORE, for the reasons stated above *pro se* Plaintiff, Dr. James Eric McDonough respectfully requests that this Court strike Defendant's Motion to Stay discovery in its entirety; strike the motion *sua sponte*; impose monetary and non-monetary sanctions against Defendant and Defendant's counsel; and for any additional relief this Court deems just and proper.

Respectfully submitted,

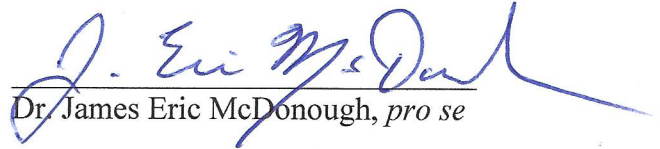


Dr. James Eric McDonough, *pro se*
32320 SW 199th Ave
Homestead, FL 33030
Phone: (571) 245-5410
Email: Phd2b05@gmail.com

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of this filing has been served by email on counsels for Defendant, Matthew Mandel at MMandel@WSH-law.com, Samuel Zeskind at SZeskind@wsh-law.com, and Matthew Pearl at mpearl@wsh-law.com, as well as City Clerk Elizabeth Sewell at ESewell@cityofhomestead.com on this 27th day of March 2019.

Respectfully submitted,




Dr. James Eric McDonough, *pro se*

[Verification Page Follows]

VERIFICATION PAGE

As Affiant, I, Dr. James Eric McDonough, hereby declare under penalty of perjury that the above facts are true and correct to the best of my knowledge and ability. Further, Affiant sayeth not.

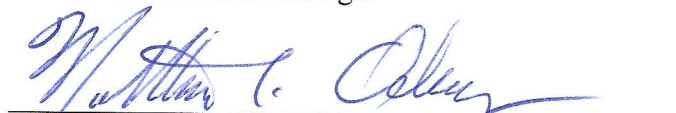

DR. JAMES ERIC MCDONOUGH, Affiant

STATE OF FLORIDA

COUNTY OF MIAMI-DADE

Sworn to and subscribed before me this 27th day of March 2019 by

Dr. James Eric McDonough



Signature of Notary Public – State of Florida



Name of Notary, Typed, Printed or Stamped

Known ☒ OR Produced Identification _____

Type of Identification Produced _____



EXHIBIT J



Eric McDonough <phd2b05@gmail.com>

Scheduling hearings

Eric McDonough <phd2b05@gmail.com>

To: "Matthew H. Mandel" <MMandel@wsh-law.com>

Mon, Mar 11, 2019 at 3:56 PM

Dear Counselor,

It is hoped you are well.

It is assumed that you will be representing City of Homestead in the recently filed case, Case No. 19-06869. I was seeing if we could confer on setting a hearing in this case at the earliest possible time.

I was also checking on when we could set a hearing for the Discovery Motions in case, Case No. 17-017515. You stated that you would work to set the hearing as soon as the case was transferred back to Judge Rebull, which occurred last week.

Please respond as soon as you are able so we can set hearings for these cases.

Thank you.

Dr. James Eric McDonough

EXHIBIT K



Eric McDonough <phd2b05@gmail.com>

Scheduling hearings

Matthew H. Mandel <MMandel@wsh-law.com>

To: Eric McDonough <phd2b05@gmail.com>

Cc: "Samuel I. Zeskind" <SZeskind@wsh-law.com>

Mon, Mar 11, 2019 at 5:37 PM

Hello Dr. McDonough,

Thank you for your wishes, and the same to you.

Regarding Case No. 17-017515, we are available for a motion calendar hearing on March 21, which is the next available motion calendar. Judge Rebull's calendar is suspended the following week, and it does not resume until April 2 (though I am not available on that date). If you are not available on March 21, I can be available on April 4. Please let me know.

As for Case No. 19-06869, I understand that you now have the requested documents, which the City has not charged you for. So the matter is moot, and we do not see any basis for a hearing on that case.

Best regards.

[Quoted text hidden]

Matthew H. Mandel

Member / Chair, Litigation Division

**WEISS SEROTA HELFMAN
COLE & BIERNAN**

AT THE CROSSROADS OF BUSINESS, GOVERNMENT & THE LAW



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Pursuant to the Fair Debt Collection Practices Act, this communication is from a debt collector. Any information obtained will be used for the purpose of collecting a debt.

3/21/2019

Gmail - Scheduling hearings

EXHIBIT F



Eric McDonough <phd2b05@gmail.com>

Response for Remaining non-produced records

Elizabeth Sewell <ESewell@cityofhomestead.com>
To: Eric McDonough <phd2b05@gmail.com>

Fri, Mar 15, 2019 at 2:42 PM

Good afternoon Mr. McDonough,

The remaining responsive records are in the below dropbox link.

<https://www.dropbox.com/sh/29mthue5x4aya4j/AAInxseeliDctDDFKVSLjGPd?dl=0>

From: Eric McDonough [mailto:phd2b05@gmail.com]

Sent: Wednesday, March 13, 2019 10:04 PM

To: Elizabeth Sewell <ESewell@cityofhomestead.com>

Cc: Matthew Pearl <mpearl@wsh-law.com>; Matthew H. Mandel <MMandel@wsh-law.com>

Subject: Remaining non-produced records

Dear Elizabeth,

I have not received a response acknowledging my request this morning for the remaining responsive records which were not supplied in the initial response on 3/11/2019.

As you are aware Judge Rodriguez issued an Alternative Writ in Mandamus today requiring the City to respond with its defenses within 20 days, thereafter an immediate hearing will be set.

While my Amended Complaint stated that records were provided on 3/11/2019, it was not clear that not all records had been produced.

Please provide the remaining responsive records by Monday 3/18/2019.

If you fail to produce the remaining records I will have to consider contacting Judge Rodriguez's chambers again to set an additional immediate hearing to force their production, as is my right under FS. 119.11(1). However, I prefer to minimize time and resources wasted by all parties including the court.

Thank you for your compliance.

3/23/2019

Gmail - Response for Remaining non-produced records

Dr. James Eric McDonough

EXHIBIT H



Eric McDonough <phd2b05@gmail.com>

Response for Remaining non-produced records

Elizabeth Sewell <ESewell@cityofhomestead.com>

To: Eric McDonough <phd2b05@gmail.com>

Thu, Mar 21, 2019 at 12:22 PM

Cc: Julissa Chavez <JChavez@cityofhomestead.com>

Good afternoon Mr. McDonough,

Attached are additional records responsive to your public records request dated February 18, 2019. These records have been redacted pursuant to section 119.071(5)(b), Florida Statutes ("Bank account numbers and debit, charge, and credit card numbers held by an agency are exempt from s. 119.07(1) and s. 24(a), Art. I of the State Constitution."). Also, additional responsive records, in the form of doctors' notes required to substantiate medical leave requests, have been withheld as confidential and exempt from disclosure pursuant to Health Insurance Portability and Accountability Act Privacy Rule of 1996 (HIPAA), and sections 119.071(4)(b), 112.08(7), 395.3025(7)(a), 456.057, Fla. Stat.

[Quoted text hidden]

**Murguido Travel Information.PDF**

555K

EXHIBIT P



Eric McDonough <phd2b05@gmail.com>

Response for Remaining non-produced records PRR 2/18/2019

Elizabeth Sewell <ESewell@cityofhomestead.com>

Tue, Mar 26, 2019 at 2:01 PM

To: Eric McDonough <phd2b05@gmail.com>

Good afternoon Mr. McDonough,

Attached are emails concerning workers' comp leave taken by Officer Murguido in 2014. Please note that the medical records attached to the February 23, 2014 email have been withheld as confidential and exempt from disclosure pursuant to the Health Insurance Portability and Accountability Act Privacy Rule of 1996 ("HIPAA"), and sections 119.071(4)(b), 112.08(7), 395.3025(7)(a), 456.057, Fla. Stat.

The incident report(s)/workers comp reports and accident reports referenced in your emails below were not part of the leave process and were not used to substantiate any requests for leave. Therefore, such reports are not responsive to your February 18, 2019 request. As a result, the City will process your request for these reports relating to Officer Murguido as a new request, of which the City acknowledges receipt.

From: Eric McDonough [mailto:phd2b05@gmail.com]

Sent: Tuesday, March 26, 2019 12:46 PM

To: Elizabeth Sewell <ESewell@cityofhomestead.com>

Cc: Matthew H. Mandel <MMandel@wsh-law.com>; Matthew Pearl <mpearl@wsh-law.com>; Samuel I. Zeskind <SZeskind@wsh-law.com>; Elvis Maldonado <EMaldonado@cityofhomestead.com>; Patricia Fairclough <PFairclough@cityofhomestead.com>; George Gretsas <GGretsas@cityofhomestead.com>; Jenifer Bailey <JBailey@cityofhomestead.com>; Larry Roth <LRoth@cityofhomestead.com>; Stephen Shelley <SShelly@cityofhomestead.com>; Jon Burgess <JBurgess@cityofhomestead.com>

Subject: Re: Response for Remaining non-produced records

Dear Elizabeth,

I have not heard back from you regarding the still unprovided responsive documents regarding the Worker's Comp leave Officer Alejandro Murguido took between February 7, 2014 and March 1, 2014. This would include at least: 1) The State Workers Comp reporting form which is required by the State; and 2) The City of Homestead Accident Report used to report accidents to human resources. Both of these are public records and should not be exempt. Please provide these records and any and all further records responsive to the February 18, 2019 records request immediately.

Thank you,

Dr. James Eric McDonough

On Sat, Mar 23, 2019 at 3:45 PM Eric McDonough <phd2b05@gmail.com> wrote:

EXHIBIT R



Eric McDonough <phd2b05@gmail.com>

Discovery request 19-06869

Eric McDonough <phd2b05@gmail.com>

Thu, Mar 14, 2019 at 1:41 PM

To: Matthew Pearl <mpearl@wsh-law.com>, "Matthew H. Mandel" <MMandel@wsh-law.com>, Elizabeth Sewell <ESewell@cityofhomestead.com>

Hello,

As the Writ of Mandamus has issued I am now entitled to discovery.

Please see attached discovery request.

Further, based on the accelerated timetable set by the Honorable Judge Rodriguez, it is respectfully requested that these discovery request be expedited and provided before or with your answer to the Complaint.

Additionally, I will be seeking to depose Fernando Morales and/or Elizabeth Sewell. It is expected that these depositions will take 2 hours or less. Please provide dates on which they would be available between March 20, 2019 and April 2, 2019, by 4:00 pm Monday, March 18, 2019. If you do not respond by this time it will be understood by all parties that you have no intention to voluntarily cooperate and I will move to set the deposition(s) at the earliest time convenient to me and will subpoena the deponents.

3 attachments**Interrogatories.pdf**

3757K

**Request for Production of Documents.pdf**

3961K

**Request for Admissions.pdf**

1694K